

## **Frequently Asked Questions: TAS Eligibility Process for the Clean Water Act Water Quality Standards and Certification Programs**

This document provides answers to FAQs about the treatment in the same manner as a state (TAS) eligibility process for the Clean Water Act (CWA) water quality standards (WQS) and certification programs. It explains the processes under which governmental entities or other stakeholders can provide input during the U.S. Environmental Protection Agency's review of TAS eligibility applications and on WQS proposed by a federally recognized Indian tribe (tribe or tribal). It also provides information on how WQS and certifications are implemented through other CWA programs.

### **1. What requirements must a tribe meet in order to obtain approval of a TAS application under the CWA?**

**Answer:** In 1987, Congress amended the CWA by adding Section 518 to address the role of tribes. Section 518 provides a method for tribes to be treated in the same manner as states for certain CWA programs. Section 518(e) describes the criteria a tribe must meet in order to be eligible for TAS. In accordance with CWA Section 518(e), EPA established regulations at 40 CFR 131.8 that describe the process and requirements for TAS approval to establish WQS and provide water quality certifications under the CWA (*see also* 40 CFR 131.4(c)). To obtain approval for WQS TAS under CWA Section 518(e) and EPA regulations at 40 CFR 131.8, a tribe must show that it:

- is federally recognized by the Secretary of the U.S. Department of the Interior;
- has a governing body carrying out substantial governmental duties and powers over a reservation;
- is proposing to carry out water quality standards functions that pertain to the management and protection of water resources within a reservation and has authority to regulate water quality; and
- is reasonably expected to be capable of carrying out the functions of an effective WQS program.

### **2. What public participation opportunities are available for TAS applications?**

**Answer:** Under EPA's regulations, EPA provides notice of a tribe's assertion of authority over waters included in its TAS application to appropriate governmental entities (states, tribes, and other federal entities located contiguous to the reservation of the tribe applying for TAS) for comment. Comments are limited to the tribe's assertion of authority. EPA also provides notice to local governments and the public, whose comments are submitted through appropriate governmental entities. In addition, EPA provides similar opportunities for comment regarding tribal authority over nonmember activities when it develops a Proposed Findings of Fact document and makes that available for review prior to issuing a decision.

### **3. What does it mean if a tribe receives TAS for WQS and 401 certification under the CWA?**

**Answer:** Once EPA approves a tribe's TAS status for a particular program under the CWA, the tribe is generally eligible to administer that program as a state would, with TAS status limited to the specific program covered by EPA's TAS decision. Thus, when a tribe submits a TAS application requesting CWA authority under Section 303(c) and Section 401, EPA's

## Attachment E

approval of the TAS application would apply only to those programs, and only to the reservation waters for which the tribe seeks approval.

### **4. Is EPA's approval of a TAS application for Sections 303(c) and 401 of the CWA the same as EPA approval of tribal WQS?**

**Answer:** No. TAS approval is not the same as EPA approval of tribal WQS. TAS makes a tribe eligible to administer a WQS program. A tribe with TAS must still obtain federal approval of the WQS it submits to EPA before those standards can become effective under the CWA.

WQS consist of designated uses for water bodies, water quality criteria to protect those uses, and an antidegradation policy consistent with 40 CFR 131.12. A tribe's WQS would set goals for how clean reservation waters covered by the TAS approval should be and establish benchmarks for how activities that affect those waters can maintain acceptable water quality. EPA approval of the tribe's standards would enable the standards to serve as a basis for limitations in permits for discharges into reservation waters and would enable reservation waters to be protected by federally approved tribal CWA standards just as waters outside Indian country may be protected by federally approved state CWA standards.

### **5. What is the process for development and EPA review of tribal WQS?**

**Answer:** Like states, all tribes with TAS must follow the procedures for developing EPA-approved standards set forth at 40 CFR 131.20. Thus a tribe would develop proposed standards, make them available to the public, hold a public hearing regarding the proposed standards, and submit standards to EPA for approval within 30 days of adopting the standards. A tribe with TAS that has previously developed and adopted WQS under tribal law may use this process to seek EPA approval for its existing standards, or, where necessary, may modify its standards to comply with the CWA. Or a tribe may develop new standards and seek EPA approval of such standards. But in every case, a tribe with TAS must obtain EPA approval of its standards following the same process a state must follow before the standards take effect under the CWA.

### **6. Will the public be able to comment on the tribe's WQS?**

**Answer:** Yes. The tribe would need to hold a public hearing for the purpose of reviewing water quality standards in accordance with provisions of tribal law, as provided in EPA's water quality standards regulation at 40 CFR part 131, and the public participation regulations at 40 CFR part 25, including the requirement to make the proposed standards and supporting analyses available to the public prior to the hearing. *See* 40 CFR 131.20. The tribe would evaluate the public's comments, adopt any appropriate revisions, and then submit the WQS to EPA for review. EPA reviews the tribe's standards following the same process it uses to review WQS submitted by a state. The tribe's WQS would be in effect under the CWA only after EPA approval.

### **7. Do federally approved state WQS apply to waters in Indian country?**

**Answer:** State standards generally do not apply to waters in Indian country under the CWA unless the state has demonstrated authority to set such standards and EPA has expressly found state authority and approved state standards for Indian country.

### **8. Are state and tribal WQS expected to be compatible?**

**Answer:** Tribal WQS should be developed considering the quality and designated uses of waters entering and leaving reservations. EPA's regulations require that a state or tribe ensure that its WQS provide for the attainment and maintenance of the WQS of downstream

waters. *See* 40 CFR 131.10. Thus, it is important that the tribes recognize what the surrounding state (or another Indian reservation) WQS are even though there is no requirement to match those standards.

EPA has recommended to tribes that they use the standards of the adjacent states as a starting point for developing tribal standards. In most cases, the state standards are based on EPA's recommendations for narrative and numeric criteria. EPA's experience has been that tribes often set standards that are based on, or are similar to, standards set by an adjacent state. Often, even if there are differences between a tribe's and a state's use designations, the water quality criteria used by each jurisdiction to protect those uses are largely the same. Approved tribes, as well as states, often adopt water quality criteria that are the same as EPA's current national recommendations. Where differences exist in numeric criteria for a particular substance, it may simply be due to the timing of the state's and tribe's WQS revisions.

To the extent that differences do exist between state and tribal standards, a tribe and state may work together to resolve differences on a case-by-case basis, just as neighboring states work out differences. EPA regulations also provide for a mechanism to address disputes between states and tribes arising as a result of differing WQS adopted on common bodies of water where the difference in WQS results in unreasonable consequences. *See* 40 CFR 131.7.

**9. Once a tribe has received TAS for Sections 303(c) and 401 of the CWA, can a tribe issue National Pollutant Discharge Eliminations System (NPDES) Permits?**

**Answer:** No. EPA will continue to issue NPDES permits for the reservation. The tribe's TAS for WQS applies only to the tribe's authority to establish WQS under Section 303(c) of the CWA for reservation waters covered by the application and to issue water quality certifications under Section 401 of the CWA for federal permits and licenses for activities that discharge to those waters. A tribe must qualify for TAS status for each provision of the CWA or environmental program that it seeks to implement. At this time, no tribe has been approved for TAS status to administer the NPDES or any other CWA permit program on its reservation. An NPDES permit issued by EPA would need to contain any limits necessary to ensure compliance with EPA-approved tribal WQS. For a discharge upstream of the reservation, an NPDES permit must include conditions that ensure compliance with the applicable water quality requirements of the downstream waters covered by a TAS approval. *See* 40 CFR 122.4(d); 40 CFR 122.44(d) (3) and (4).

**10. Once a tribe has received TAS for Sections 303(c) and 401 of the CWA, can the tribe prepare Section 401 Water Quality Certifications?**

**Answer:** Once a tribe with TAS designates a certifying agency, *see* 40 CFR 121.1(e), that agency becomes authorized to prepare water quality certifications for federal permits and licenses for activities that may result in any discharge to the reservation waters covered by the TAS approval. Where EPA approves a tribe for TAS for purposes of WQS, the tribe likewise is eligible to the same extent as a state for purposes of certifications conducted under Section 401 of the CWA. EPA regulations (40 CFR part 121) address the issuance of water quality certifications by states and tribes with TAS.

This means that a tribe would evaluate whether a discharge under a federal license or permit would be consistent with the tribe's WQS and decide whether to grant, deny, or condition a water quality certification under Section 401 of the CWA. Thus, a federally issued NPDES or Section 404 permit for a facility (or activity) discharging into reservation waters covered by the TAS approval could not be issued without a tribal CWA Section 401 certification or waiver. EPA retains authority for issuing water quality certifications where a tribe has not been approved for TAS for WQS and water quality certifications. The CWA also provides a

## Attachment E

tribe with TAS a formal role in commenting on federal licenses or permits for discharges upstream from or adjacent to tribal waters. *See* CWA Section 401(a) (2).

### **11. Does TAS approval for Sections 303(c) and 401 of the CWA give a tribe enforcement authority for WQS under the CWA?**

**Answer:** No. EPA's approval of a tribe's TAS application would not provide any enforcement authority to the tribe under the CWA. WQS help protect and improve water quality, but do not impose any directly enforceable requirements on any party. They do serve as a basis for specific control actions, such as effluent limitations in permits, that are enforceable, but the tribe's TAS approval to establish WQS and provide water quality certifications does not provide the tribe with any authority to enforce the standards. EPA would remain the entity with enforcement authority under the CWA. Unless and until a tribe is federally approved to implement a federal permitting program, if a tribe chooses to establish any regulations or enforcement measures to enforce the standards, it must do so under tribal law pursuant to the tribe's inherent authority as a sovereign government.

Under the CWA, a tribe's WQS would serve as benchmarks for water quality when EPA issues NPDES permits to facilities or when the U.S. Army Corps of Engineers issues Section 404 permits for activities that discharge to the reservation waters covered by the TAS approval. EPA or the Corps of Engineers is responsible for both issuing and enforcing these permits, which would include any conditions based on a tribe's Section 401 certification.

### **12. How would tribal water quality standards affect Total Maximum Daily Loads (TMDLs)?**

**Answer:** A TMDL is a "pollution budget" for a water body that is failing to meet applicable WQS. A TMDL includes (1) a calculation of the maximum amount of a pollutant that a water body can receive and still meet WQS and (2) allocations of that total pollutant load to its point and nonpoint sources.

Water bodies on a reservation that have been listed under Section 303(d) of the CWA as not meeting applicable WQS require development of a TMDL set at a level that will implement the applicable WQS with seasonal variations and a margin of safety. For reservation waters, EPA could establish any needed TMDLs until the tribe obtains TAS for the TMDL program. TAS approval for TMDLs under Section 303(d) requires a separate approval beyond a TAS approval for Section 303(c) and Section 401 of the CWA.